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MORATORY LEGISLATION IN THE UNITED STATES

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An Address before the Association of Life Insurance Council, at New York December 5th, 1917

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AN ADDRESS BEFORE THE ASSOCIATION OF LIFE INSURANCE COUNSEL AT NEW YORK, DECEMBER 5, 1917

Moratorium is defined as a legal authorization postponing for a specified time the payment of debts. The term is also frequently employed to signify the period over which the indulgence or grace extends. Its effect is to give an extension of credit for the designated period, so that during such period no action is maintainable in respect of a debt coming within the proclamation or decree. It operates upon the obligation by deferring its maturity, as well as all steps required to preserve the creditor's rights against third parties. In this respect it differs from a stay law, which affects the remedy and applies only to matured obligations and perfected rights.

A moratorium is usually declared by executive proclamation, which has the force of law, either by virtue of the prerogative or by general or special legislative grant of authority. It is described, according to its scope, as either major or minor. A minor moratorium applies only to bills of exchange; a major includes all other debts, except such as may be expressly reserved. The English proclamation of August 2, 1914, is an example of a minor moratorium; that which followed on August 6th, under the authority of the Postponement of Payments Act of 1914 (passed August 3), was a major moratorium.

Moratoria have been most frequently resorted to on the Continent in Europe and in Latin America. There is a legal, as well as a practical, reason for this. Not only have the emergencies which seem to require such relief more frequently arisen there, but the remedy is more in keeping with the spirit of the Civil Law by which those countries are governed, than with that of our Common Law. Seemingly the last previous British moratorium was declared in 1806, when England was, as now, in the throes of a great fight for freedom and equality among nations. In the United States, under

the constitution, a technical moratorium has usually been thought to be impossible. Substantially the same result, however, has been reached upon occasion in the States by indirection (proclamation of legal holidays or temporary closing of courts) and by means of stay laws.

THE PENDING FEDERAL SOLDIERS' AND SAILORS' CIVIL RIGHTS BILL

On October 4, 1917, a bill described as the "Soldiers' and Sailors' Civil Rights Act" (H. R. 6361) was passed by the House of Representatives and on October 6th formally referred to the Senate. A similar bill (S. 2859) had already been introduced in the Senate and referred to the Judiciary Committee, which had held two public hearings on the bill before Congress adjourned. These bills originated in the War Department. They were drafted by officers on the staff of the Judge Advocate General and have the Administration's support. The exertion of pressure to secure the substitution of the House bill and its prompt consideration by the Senate at the December session may, therefore, be expected.

The bill, as its title indicates, is intended for the benefit of persons in the military service of the United States. Its immediate purpose, as recited in the first section (§ 100), is "to prevent prejudice or injury to their civil rights during their term of service."

The ultimate purpose of this bill, as recited in the same section, is that of:

"enabling the United States the more successfully to prosecute and carry on the war in which it is at present engaged."

This purpose is to be accomplished by provisions contained in Articles II, III, IV and V of the bill, which modify existing rules of law and of contract applicable to the beneficiaries of the Act with respect to court proceedings and judgments (Art. II), rents, instalment contracts and mortgages (Art. III), life insurance (Art. IV) and taxes (Art. V). Articles I and VI of the bill contain, respectively, definitions of terms employed and general administrative provisions, which will be referred to only in connection with the discussion of the other articles.

By Article II power is conferred to stay proceedings in any action, and to vacate or set aside any judgment rendered against a military person, if, in the court's opinion, the defendant's ability to defend the suit or respond to the judgment is affected by reason of his or her military service. It provides that no judgment shall be taken by default without proof that the defendant

is not in military service or the filing of an indemnity bond by the plaintiff. Provision is made for the appointment by the court of an attorney to protect the interests of the defendant in the action in case of default, but authority to bind the person for whom he acts, or waive any of his rights, is expressly denied. Any such judgment is subject to be opened by the court and the defendant, or his representative let in to defend, upon application made not later than ninety days after the termination of his military service, if it appears that he has a meritorious defense and was prejudiced by such service in making such defense. The court is empowered to require a bond as a condition of granting judgment, and rights acquired thereunder by purchasers in good faith are not to be impaired.

Wide discretion is conferred upon the court in granting stays, imposing terms and conditions for judgment, re-opening defaults, modifying orders and judgments, directing payment by instalments and in relieving military persons from fines or penalties, incurred during and as a result of service, under contracts providing for forfeiture in event of non-performance.

Finally, the term of military service is excluded in computing the term limited by law for bringing suits involving military persons or their legal representatives.

Article III affects instalment contracts and mortgages and the remedies ordinarily available upon the non-payment of rents of dwellings. By section 300 the remedies of eviction and distress for the recovery of premises, or the rent of premises, occupied by a military person or his dependents, provided that the rent thereof does not exceed $50.00 per month, are made subject to leave of court. Unless it appears that the tenant's ability to pay is not materially affected by his service, the court may stay proceedings for three months, or afford other relief in its discretion. Participation by any person in an eviction or distress, otherwise than as permitted by this section, is made a misdemeanor, punishable by fine and imprisonment.

The vendor's right to rescind, reserved under contracts for the sale of real and personal property for non-payment of instalments, and to resume possession is modified by section 301. The court is empowered to require, as a condition to recision of any such contract, the return of payments made, or, in its discretion, to stay proceedings as in the case of actions. By section 302 like discretion is conferred upon the court with reference to legal proceedings for the enforcement of mortgages; and sales

under powers of sale and judgments entered upon warrant of attorney to confess judgment contained in mortgages are forbidden, without leave of the court.

Provision is made by Article IV for the carrying of life insurance effected by military persons prior to September 1, 1917. The amount entitled to the benefits provided is limited to $5,000, and the Bureau of War Risk Insurance is given power to determine which policies shall be rejected in cases where application is made for larger amounts. Policies subject to the payment of additional premiums, or to forfeiture if the insured engage in military service in time of war, or to a reduction in the amount of benefit paid in event of death during or as a result of such service, are not eligible.

The government is required to guarantee payment of the premium accruing under accepted policies, for the period of service, by depositing monthly with the respective companies concerned a sufficient amount in United States bonds to cover. As indemnity against loss, the United States is to acquire by its interposition, with the consent of the insured and of all persons having vested interests in these policies, first liens for the amounts of the premiums so secured, with interest at the rates provided in the policies. The companies are forbidden to lapse any such policies for non-payment of premiums, or to make any settlements in derogation of such liens. One year after the termination of the war there is to be an account stated between the United States and the companies, and the balances in favor of the companies are to be paid to them upon the surrender of the bonds received by them in accordance with the act.

Article V applies to taxes and public lands. Under section 500 payment of all taxes and assessments upon any real property owned and occupied, either as a residence or for business purposes, by a military person at the time of entering upon military service, and accruing during such service, may be deferred by the court for the period of six months after the termination of the war. The right to sell such property for non-payment of taxes is conditioned upon leave of court, and the privilege is given to military persons to redeem or to commence actions to redeem property sold for taxes within six months after the termination of their service. Section 501 supplements various acts therein referred to which relieve persons in the military service from the obligation to comply with the strict requirements of various statutes of the United States relating to the

public lands, in order to maintain or perfect their rights to homesteads, mining claims, etc., acquired prior to entering military service.

The bill provides, by paragraph 4 of section 100, that:

"(4) The term 'court,' as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record."

And by section 102, paragraphs (1) and (2):

"(1) That the provisions of this Act shall apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, and to proceedings commenced in any court therein, and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed.

"(2) When under this Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court of competent jurisdiction, Federal, State, or local."

CURRENT STATE STATUTES

At the time of the introduction of the Soldiers' and Sailors' Civil Rights bill in Congress there had been enacted and were in force in nine states laws affording limited relief from pecuniary and other contract obligations to persons engaged in the military or naval service. Of these statutes seven were emergency measures passed since the declaration of war. The remaining two were parts of the general statutes relating to the military forces of the respective states. The following table shows the general provisions of these several acts. (See page 6.)

On October 12, 1917, the Mississippi legislature passed an act, the provisions of which are substantially identical with Articles I, II, III, and VI of the proposed Federal Soldiers' and Sailors' Civil Rights Act. It is of interest to note, however, that the Mississippi statute does not provide relief from the obligation to pay taxes.

In addition to the two statutes referred to in the following table as passed by the General Assembly of Maryland at its last session, that legislature, by Chapter 21 of the laws of 1917, has authorized the Governor of the state, in his discretion, in event of emergency, to declare successive legal holidays which

ANALYSIS OF STATE STAY LAWS AFFECTING MILITARY PERSONS ONLY

In Effect November 30, 1917

State.	*Payments Postponed.*	*Actions Continued.*	*Period.*	*Exemptions from Execution.*	*Period of Limitations Extended.*	*Tax Exemptions.*	*Contract Remedies Suspended.*
Iowa .....Ch. 380, L. 1917,	All.	On request.	War & 6 mos.	Absolute.	For third parties.	Homestead or $10,000.	
Maine .....Ch. 273, L. 1917,		Discretionary.	War.	$1,000 addit'n'l.	For both parties.		
Maryland .....Ch. 23, L. 1917,		Discretionary (revocable).	War & 6 mos.	Discretionary (revocable).			Discretionary (revocable).
Massachusetts ....Ch. 342, L. 1917,		Discretionary (defaults reviewable).	War & 6 mos.		For soldiers.		
Michigan, Sec. 62, Ch. 72, L. 1911,		"No process shall issue or be in force."	Service and 30 days.		For third parties.		
Mississippi .....Ch. 36, L. 1917,		Discretionary (defaults reviewable).	War & 3 mos.	Discretionary.	For both parties.		Discretionary.
Oregon .....Ch. 275, L. 1917,		(Enlisted men only.)	War & 60 days.	Lands only.	For third parties.		
Pennsylvania ....Ch. 47, L. 1915,		"No civil process shall issue."	Service and 30 days.				
Texas .....Ch. L. 1917, (Approved Sept. 17, 1917.)		On application (enlisted men only).	War.				Discretionary (real property only).
Wisconsin .....Ch. 499, L. 1917,		On application.	3 years.		For both parties.		

shall have the effect of a general moratorium with respect to "the presenting for payment or acceptance and the protesting and giving notice of dishonor of bills of exchange, bank checks, drafts and promissory notes."

During the Civil War many of the states, both North and South, passed laws for the protection of their citizens from suit while engaged in military service. Several of the Southern states, in addition, enacted stay laws of general application either during the war or during the reconstruction period. The general character of these statutes and the states wherein they were enacted are indicated in the following tables. (See page 8.)

Before the adoption of the Constitution, legislation of this latter sort was rife. Marshall says in his life of Washington (V. 5, p. 86):

"The other party marked out for itself a more indulgent course. Viewing with extreme tenderness the case of the debtor, their efforts were unceasingly directed to his relief. To exact a faithful compliance with contracts was, in their opinion, a measure too harsh to be insisted on, and was one which the people would not bear. They were uniformly in favor of relaxing the administration of justice, of affording facilities for the payment of debts, or of suspending their collection, and of remitting taxes. The same course of opinion led them to resist every attempt to transfer from their own hands into those of congress powers which by others were deemed essential to the preservation of the union. In many of the states the party last mentioned constituted a decided majority of the people; and in all of them it was very powerful. The emission of paper money, the delay of legal proceedings, and the suspension of the collection of taxes, were the fruits of their rule wherever they were completely dominant."

It is not the purpose of this discussion to treat of the question of expediency. The motive underlying these current statutes and the bill pending in Congress is one apt to command genuine sympathy and ready approval from persons whose pecuniary interests are not adversely affected. If the burden imposed upon creditors by these measures were sufficiently distributed, there might be little hardship and no complaint. The discretion conferred upon the court by most of the acts, to limit their application to meritorious cases, and in two (Maryland and Maine) the right to consider the situation of the creditor as well, may mitigate somewhat the hardships inherent to the operation of such laws.

CIVIL WAR PERIOD

State Statutes Authorizing Postponements of Proceedings in Actions

	Against Military Persons.		*Against Debtors Gener*	
State.	*Statute.*	*Period.*	*Statute.*	*Perio*
Alabama	Act 33, 1861,	Service.	Act 33, 1861.	Indefini
	Act 52, 1863,	Indefinite.		
Arkansas	Act 14, 1864,	Indefinite.	Act Dec. 1, 1862.	Indefini
Florida	Act Dec. 13, 1861,	Indefinite.		
Georgia	Act 53, 1861,	Service and 3 mos.		
Illinois	Act May 3, 1861,	Indefinite.		
Iowa	Ch. 11, L. 1862,			
Kentucky	Ch. 452, L. 1862,	Service.	Ch. 38, L. 1861.	Definite
Louisiana	Act 18, 1867,	Service.		
Maine	Ch. 63, L. 1861,	Service.		
Maryland			Ch. 17, L. 1861.	Definite
			Ch. 249, L. 1862.	Definite
Massachusetts.	Ch. 188, L. 1862,	Service and 6 mos.		
Minnesota	Ch. 21, L. 1865,	Service.		
Missouri	P. 46, L. 1861,	Service & 30 days.		
New York....	Ch. 578, L. 1864,	Service.		
North Carolina.			Ch. 10 and 16, L. 1861.	Indefini
Ohio	P. 113, L. 1861,	Service and 2 mos.		
	P. 22, L. 1862,	Service and 2 mos.		
Pennsylvania .	Ch. 377, L. 1861,	Service & 30 days.	Ch. 696, L. 1861.	Definite
	Ch. 475, L. 1862,	Service & 30 days.*		
Rhode Island..	Ch. 437, L. 1862.	Service.		
South Carolina.			Act 4571, Dec. 21, 1861.	Indefini
			Act 4640, Feb. 6, 1863.	Indefini
			Act 4675, Dec. 17, 1863.	Indefini
			Act 4724, Dec. 23, 1864.	Indefini
Tennessee	Ch. 3, L. 1861.	Service.		
Texas			Ch. 7, L. 1861.	Definite
Virginia			Ch. 7, L. 1863.	Indefini
Wisconsin	Ch. 309, L. 1861.	Service.	Ch. 3, L. 1864.	Definite
	Ch. 32, L. 1863.	Service.		

*Breitenbach vs. Bush (44 Pa. St., 313) holds that pediod of service means ter enlistment, which is 3 years and, therefore, definite.

RECONSTRUCTION PERIOD

State Statutes Authorizing Stay of Legal Proceedings or Postponement of Paymen

	Continuance of Actions.		*Instalment of Deb*
State.	*Statute.*	*Period.*	*Statute.*
Alabama	Act 71, 1866.	Indefinite.	Act 71, 1866.
	Act 4, 1868.	Definite.	Act Aug. 12, 1868.
Georgia			Act Dec. 13, 1866.
Mississippi	Chap. 84, L. 1865.	Definite.	
North Carolina.	Chap. 38, L. 1866.	Definite.	Chap. 19, L. 1866.
	Chap. 58, L. 1867.	Definite.	Chap. 27, L. 1867.
South Carolina.	Act 4734, Dec. 21, 1865.	Indefinite.	Act 4734, Dec. 21, 1
Texas			
Virginia	Chap. 69, L. 1866.	Definite.	Chap. 125, L. 1865.

If life insurance companies, as such, were affected, the result would verily be serious. So far as the State statutes are concerned, however, their rights and obligations under outstanding policies do not seem to be involved at all by the characteristic provisions of these statutes, viz., those authorizing the continuance of actions brought to compel the performance of pecuniary and other obligations. That there is no obligation upon the policyholder by the usual contract of life insurance, upon which the exemptions of these statutes could operate, needs little argument. The payment of premiums is not obligatory, but purely optional. The contract is wholly unilateral, and the payment of premiums is merely the condition to a continuance of the company's liability. With the expiration of the period for which premiums have been paid, if the premium for the succeeding period be not paid, the original contract of insurance terminates. There is nothing due from policyholder to company, payment of which may be postponed by the act; and nothing in the acts even suggesting the postponement of the change which automatically occurs in the company's obligation under the policy as a result of the situation.

In addition to the usual provisions, the Mississippi statute, and one of the Maryland statutes, contain provisions modifying the remedies prescribed by contracts for the obligees' redress in event of breach. Section 11 of the Mississippi act, the provisions of which are the same as those of section 301 of the Federal Soldiers' and Sailors' Civil Rights bill, relate to what are termed in the section title "instalment contracts." Not only are life insurance contracts not, strictly speaking, "instalment contracts," but the instruments referred to in the act are expressly limited to contracts "for the purchase of real or personal property or of lease or bailment with a view to purchase of such property." Similarly, the Maryland act (Chapter 23, laws of 1917) refers and applies to forfeitures, etc., with respect to legal and equitable interests in property.

TEST OF CONSTITUTIONALITY APPLIED TO STATE STATUTES

It may be of interest, however, to consider the question of the constitutionality of these statutes. It is a fair inference that the readiness with which the pre-constitutional state legislatures yielded to the popular demand for general measures of this sort, and the ruinous effects which they wrought, were among the chief moving causes for the inclusion in the Federal Consti-

tution of that provision of paragraph 1, section 10, Article 1, which forbids the states to pass any law impairing the obligation of contracts. Contemporary writers of authority have expressed this view (Marshall: Life of Washington, V. 5, p. 86; Ramsay: History of South Carolina, V. 2, p. 429). If such were the purpose of that prohibition, it remains to see whether the provision were effectual.

The statutes of the middle period of our history were uniformly stay laws, or laws changing the terms or jurisdiction of the courts. As was to be expected, much litigation resulted, although none of the cases, so far as I have been able to discover, reached the Supreme Court of the United States. Two lines of decisions resulted, however, in the state courts. Whether the theory adopted were that the obligation is separable or inseparable from the remedy, it was undeniable that the legislatures, through their inherent power to establish courts, order their sessions and prescribe their procedure, could, to some extent at least, affect the remedies available for the enforcement of contracts. Although it required, in some jurisdictions, what may perhaps be regarded as a disingenuous recital of legislative intent, in order to sustain these statutes in the courts, the result reached generally was that, if the remedy were merely postponed for a definite and reasonable period, the statute was inoffensive to the Federal Constitution; but that a statute which authorizes stay of execution for an unreasonable or indefinite period on judgments rendered on pre-existing contracts is void as postponing payment, and taking away all remedy during the continuance of the stay. (Cooley: Constitutional Limitations, p. 414; Note, 1 Lawyers' Reports Annotated, 358.) Of the current state statutes digested above, only that of Wisconsin is limited to a definite period. Under this rule, it would, therefore, seem that all of the other statutes are unconstitutional and void. Where the remedy was specified in the contract, the state courts in which the question came up held that subsequent legislation was ineffectual to change it. (Breitenbach v. Bush, 44 Pa. St., 313; Boice v. Boice, 27 Minn., 371.)

How the Supreme Court of the United States would hold upon this question of constitutionality may perhaps be deduced from its decision in the case of Edwards v. Kearsey (96 U. S., 595). That case involved an increase in the amount of real and personal property exempt from execution under the North Carolina Constitution of 1868 over the amount exempt at the time

the judgment creditor made the contract in suit. Mr. Justice Swayne, who wrote the principal opinion in that case (there being two concurrences upon different grounds and one dissent without opinion) said at p. 601 of the report:

"It is also settled doctrine of this court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement.

"In Green v. Biddle (8 Wheat., 1) this court said touching the point here under consideration: 'It is no answer that the Acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owners, they are just as much a violation of the compact as if they overturned his rights and interests.'

"One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force."

However the courts, State and Federal, might rule upon this question under the impairment of contracts clause of the Federal and State Constitutions, other provisions of the constitutions of at least eleven states would seem to preclude the possibility of resort to stay laws as a means of accomplishing a practical moratorium. The constitutions of nine states provide that retroactive or retrospective laws shall not be passed. These states are Colorado, Georgia, Idaho, New Hampshire, Ohio, Missouri, Montana, Tennessee and Texas. The Constitution of New Jersey provides, by paragraph 3 of section VII, that:

"The legislature shall not pass any laws * * * depriving a party of any remedy for enforcing a contract which existed when the contract was made."

That of Virginia, by section 194, provides that:

"The General Assembly is hereby prohibited from passing any law staying the collection of debts, commonly known as 'stay laws.'"

If the Soldiers' and Sailors' Civil Rights bill become law, it will constitute the first moratory legislation ever enacted by

Congress. As may be surmised, resort was had by the proponents of the bill to national legislation upon the subject for the sake of uniformity and greater celerity. It was hoped that the measure could be pushed through both houses at the special session which closed October 6th. The State legislatures with one or two exceptions, had already adjourned before the bill was introduced. Many of them would not again convene for a year or more; and the difficulty of inducing action, to say nothing of uniform action, upon the same subject in forty-eight independent states, is apparent. Furthermore, it was thought that the inapplicability of the Impairment Clause of the Federal Constitution to Acts of Congress, indirectly affecting the obligation of contracts, would obviate an objection which might invalidate the measure as a state law. (Congressional Record, Oct. 4, 1917, pp. 8510, 8518-19.)

PRACTICAL AND CONSTITUTIONAL OBJECTIONS TO INSURANCE PROVISIONS IN PENDING FEDERAL BILL.*

Article IV of the bill, as originally drawn, prohibited the lapse or forfeiture of insurance up to $5,000 in amount on the lives of persons in the military service for non-payment of premiums, without making any provision for securing the payment of premiums unless the loan values of the policies should be sufficient to carry the insurance for the period of service and six months thereafter. Consent of policyholder, beneficiary and other persons interested was assumed. The necessity for the consent of the company was disregarded. In view of the inevitable effect of this measure upon the companies, it was evident that they could not, in justice to their other policyholders, waive the constitutional objection. The result was a redraft of this article so as to provide for the guaranty by the Government of premiums in default, which, it was evidently assumed, would at least meet the practical objections to the bill.

These insurance provisions, however, seem technically still subject to the constitutional objection. The defect lies in the attempt to change the rights and obligations of the insurance companies under their outstanding contracts without their consent. The policyholder eligible to the benefits of the act is

*I am informed that the Subcommittee of the Senate Judiciary Committee has agreed to make the changes necessary to obviate both of the following objections.

required to make formal application to the company and to the Government, and to include in such application the consent of third parties having vested interests in the policy. The Government is required to notify the company and the insured of its acceptance or rejection of the application. But the company is merely forbidden by law either to lapse or forfeit any policy to which the benefits of the act shall have been extended (section 405), or to make any settlement under any such policy in derogation of the first lien upon its value which the bill purports to confer upon the United States (section 409). There is no provision for the acceptance by the companies of the provisions of the bill, though their voluntary compliance with its terms would probably be regarded in law as such acceptance.

The debate on the bill brought out the fact that this latter provision (that giving the United States a first lien on the value of the policy) was intended to postpone any lien which the company may have previously acquired through loans on the policy or otherwise to the Government's right of indemnity against loss for premiums secured or paid by it. (Congressional Record, Oct. 4, 1917, p. 8525.) This, it would seem, is inadmissible from the companies' standpoint. If effective, it would wholly offset and nullify the provisions for the securing and ultimate payment of these defaulted premiums by the Government.

There is a further possible ground of objection on the part of the companies in the limitation of the requirement as to the consent of third persons to those who have vested interests in the policies concerned. It was not intended by the framers of the bill that the consent of the ordinary beneficiary should be required. Many experienced life insurance counsel regard such consent to any change in the policy as desirable, notwithstanding the reservation by the assured of the right to change the beneficiary. If these objections cannot be obviated through amendment, the effective remedy available to the companies may be to stand on their constitutional rights and refuse to recognize the act as valid or to comply with any of its provisions.

GENERAL CONSTITUTIONAL OBJECTIONS TO PENDING FEDERAL BILL

All of the substantive provisions of this bill involve either an impairment of the obligation of contracts, or the taking of property without compensation, or both. Representative Volstead in his

remarks on the bill pointed out two of the ways in which it constitutes a taking of property.

"One is the provision in regard to leases, which authorizes courts to suspend for three months the right of a landlord to take possession of leased premises, though held under a contract which terminates the lease on failure to pay. The other is the provision which gives the like power to stay the right to terminate a contract of sale upon failure to perform, though the contract expressly declares that it becomes void for such failure and that the vendor is entitled to the possession of the property."

(Congressional Record, Oct. 4, 1917, p. 8519.)

Still a third is the provision which permits the courts to delay indefinitely the collection of debts due from persons in the military service.

In addition, the bill expressly assumes to interfere with legal procedure in the States, by conferring upon their courts a power which they may not possess under the State laws (Sec. 102; Arts. II, III, and V); and to infringe the taxing power of the States (Art. V). There is no provision of the United States Constitution which specifically authorizes any of these things; and the fifth amendment expressly says:

"nor shall private property be taken for public use without just compensation."

The distinction, under the Federal Constitution, between acts forbidden and acts which, while they are not authorized, are not forbidden, is that the former are absolutely void, and the latter may possibly be valid. It is a familiar rule that, in the absence of express authority, the validity of an act depends upon its relation to a power directly granted to Congress. The War Power is adduced by the advocates of this bill as authority for it. They assert that the requisite authority is incidental to the power to declare war, to raise and support armies, and to provide and maintain a navy. How it is related to the raising or maintenance of armies or of naval personnel they do not even suggest. The draft is working smoothly. Applicants for service in the navy far exceed the existing vacancies. There is no discontent in the services. There are no threats of mutiny or disturbance. When reduced to the necessity of a more accurate specification, they claim that it is calculated to relieve certain hardships resulting from the war. (Congressional Record, Oct. 4, 1917, p. 8520.) They say, in this connection, that:

"The army in France will be a more spirited body of men, they

will be healthier, they will be more effective as soldiers, they will be better citizens in every way if when they are thus forcibly separated from their homes Congress says that no additional disadvantage shall come to them by reason of any oppressive action on the part of creditors."

(Committee report, Congressional Record, Oct. 4, 1917, p. 8512.)

These are, of course, praiseworthy objects, and doubtless within the implied power of Congress, if they can be accomplished without violating some express prohibition of the Constitution or infringing upon rights reserved to the people or to the States. The war powers are undoubtedly broad and necessarily in great part undefined; but they do not authorize the Government to wage war upon law-abiding citizens or loyal States, or to support armies and maintain a navy otherwise than at the general expense. Judge Cooley says at p. 507 of his work on Constitutional Limitations:

"In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are, that when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid; and in other cases property can only be taken for the support of the government, and each citizen can only be required to contribute his proportion to that end. But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment."

Several decisions of the Supreme Court are cited in the committee report as illustrating the nature and extent of the war powers. All of these cases, without a single exception, discuss the application of these powers to public enemies. Their chief reliance, however, is a single decision, with reference to which the author of the bill declared:

"It seems almost Providential, but this whole thing has been settled by the Supreme Court of the United States, so far as power goes, by the case of Stewart vs. Kahn, in 11 Wallace * * *"

(P. 15, Pt. I, Hearings on S. 2859.)

In this case the validity of an Act of Congress passed in 1864 had been denied by the Supreme Court of Louisiana. The act related to claims against residents of the seceding States. So far as material to the case, it provides:

"Whenever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action or arrest of such person."

* * * * *

"The time during which such person shall be beyond the reach of judicial process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

The court in sustaining the statute as an exercise of the war power said at p. 507:

"It is a beneficent exercise of this authority. It only applies coercively the principle of law of nations, which ought to work the same results in the courts of all the rebellious States without the intervention of this enactment."

Reduced to terms of the present discussion the court here recognized the validity of the statute in question as a war measure, operating upon an enemy State. For, as stated by the Supreme Court of Texas in the Sequestration Cases (30 Tex., 689, at p. 702):

"No single right was gained by the insurgent States. On the other hand, by the laws of war they lost all except such rights under the public laws of nations as appertain to a conquered people."

This and this alone explains why a Federal statute was held to override a State law and to control a State court with respect to a matter which, but for the forfeiture by the State of Louisiana of her sovereignty under the laws of war, would not have been within the jurisdiction of Congress under the Constitution.

Mayfield vs. Richards (115 U. S., 137), in which Stewart vs. Kahn was cited as authority, involved the same statute, and arose in the same State (Louisiana) between a citizen of that State residing in territory controlled by the Confederacy throughout the greater part of the war, and a resident of the city of New Orleans, which was in the possession of the Federal military authorities from 1862. In that case also the war power was sustained as applied to the courts and citizens of an insurrectionary State and to circumstances which resulted from enemy status. Miller vs. United States (11 Wall., 268)—another case cited in support of the bill—involved the Federal Confiscation Act. The court there sustained the statute in its application to enemy property found within the loyal States.

The ninth and tenth amendments seem a complete answer to the constitutional questions raised by the bill. They provide:

"Art. IX. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," and

"Art. X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Under these provisions the burden lies upon the proponents of the measure to find authority therefor in the Constitution, either in express terms or by necessary implication. This, it is submitted, the decisions relied upon do not accomplish for the reasons pointed out in the preceding paragraphs.

On the question of the authority of Congress to control the State courts, there is an interesting line of decisions. In the revenue acts of 1866 and 1898, Congress established, among other taxes, an excise under which bills and notes, bonds, conveyances and other legal instruments were required to bear revenue stamps. These statutes provided that no instrument subject to the tax to which the prescribed stamps had not been attached should be received in evidence in any court. The result of these decisions was summed up by the Chief Justice of the Georgia Supreme Court in the case of Small vs. Slocumb, 112 Ga., 279 (decided Oct. term, 1900), at page 282, as follows:

"We have searched diligently in the reports of the decisions of the various State courts, and have found but one State court of last resort which has made and adhered to a decision that Congress had the right to prescribe that an unstamped instrument should not be received in evidence in a State court. * * * All other State courts which have dealt directly with this question hold, so far as we have been able to ascertain, either that Congress has no power to enact that certain documents shall be incompetent as evidence in a State court, or else, without deciding what power Congress has in the matter, that the act of Congress does not apply to the State courts, but to the Federal courts only."

The Pennsylvania Supreme Court is the exception referred to. In the case of Chartiers and Robinson Turnpike Co. vs. McNamara (72 Pa. St., 278), that court refused to receive in evidence an unstamped contract, on the ground that the instrument was affected with a disability under the Federal tax law. It did, however, endorse the principle

"that Congress cannot pass laws regulating the competency of evidence in the trial of causes in the several States"

as true (p. 282).

The United States Supreme Court has expressed its views as to the independence of the State courts from Federal control in the case of Collector vs. Day (11 Wall., 113). In this case an attempt was made to collect a Federal income tax upon the salary of a State judge. The court here applied the rule laid down in the leading case of McCulloch vs. Maryland (4 Wheat., 316) with reference to precisely the reverse situation. (An attempt by the State to tax an agency of the general government.) The opinion reads, at p. 126:

"We have said that one of the reserved powers was that to establish a judicial department, it would have been more accurate, and in accordance with the existing state of things at the time to have said the power to maintain a judicial department. All of the thirteen States were in possession of this power and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States."

Cooley calls the power of taxation "an incident of sovereignty" (1 Taxation, 7). At p. 684 of his work on Constitutional Limitations the same author says:

"There is nothing in the Constitution (of the United States) which can be made to admit of any interference by Congress with the secure existence of any State authority within its lawful bounds."

Again in his treatise on Taxation, at p. 129 of volume 1, he says:

"It is the theory of our system of government that the state and nation alike are to exercise their powers respectively in as full and ample a manner as the proper departments of government shall determine to be needful and just, and as might be done by any other sovereignty whatsoever. This theory by necessary implication excludes wholly any interference by either the state or the nation with an independent exercise by the other of its constitutional powers. If it were otherwise, neither government would be supreme within what has been set apart for its exclusive sphere, but, on the other hand, would be liable at any time to be crippled, embarrassed, and perhaps

wholly obstructed in its operations, at the will or caprice of those who for the time being wielded the authority of the other."

I have been unable to find a single instance where Congress has heretofore attempted to interfere with the states in their exercise of the taxing power. Certainly there are no cases upon this subject in the books; and hence no authority, except by way of dictum. In the case of Ward vs. Maryland (12 Wall., 418), the Supreme Court of the United States has, however, indicated that it would regard as unconstitutional any attempt by Congress to interfere with the collection of state taxes under state laws. The court said in that case:

"Power to tax for state purposes is as much an exclusive power in the States as the power to lay and collect taxes to pay the debts and provide for the common defense and general welfare of the United States is an exclusive power in Congress" (p. 427).

Section 500 of Article V of this bill authorizes an interference with the process provided to enforce payment of the principal tax upon which the states rely for their support—the tax on land. That such interference is inadmissible is obvious. It is not a question of purpose or degree; but one of power. The existence of such a power is incompatible with that sovereignty which is universally conceded to the states; and the provision must, therefore, be void.

Without a doubt the states themselves could confer upon their own courts the discretion to relieve soldiers and sailors in military service from the obligation to pay these taxes, but for Congress thus to exalt the state courts over the very power to which they owe their own authority, involves a double incongruity. The following remarks of the Connecticut Supreme Court in an early case (Ely v. Peck, 7 Conn., 239) are most appropriate to the impending situation:

"The state courts are not ordained nor established by Congress and are not amenable to that body. The judiciary of a state is a constituent part of another and an independent sovereignty, from which they receive their authority and support; whose laws they are bound to execute. But they are under no such obligations to the United States, whose laws they are bound to obey as citizens, but not to execute as magistrates" (p. 242).

As to current State laws:

I. Life insurance companies, as such, and contracts of life insurance are not affected.

II. All statutes, except that of Wisconsin, will probably be held to be void, at least as to contracts made before their enactment, as impairing their obligation, insofar as they authorize the indefinite postponement of remedies existing at the time of their inception.

As to pending Federal Soldiers' and Sailors' Civil Rights Bill:

I. Insurance companies would probably be affected adversely by the provisions of Article IV, which change outstanding contracts and impose additional burdens without compensation.

II. Measure should be held unconstitutional and void because it involves:

1. Taking of property without due process of law and without compensation (Art. II, III, IV and V).
2. Infringing upon sovereign rights of the States with respect to the
   a. Control of State courts (Art. II, III and V).
   b. Collection of State taxes (Art. V).